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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 00-148
Table of Allotments,	)	RM-9939
FM Broadcast Stations.	)	RM-10198
(Quanah, Archer City, Converse, Flatonia,	)	
Georgetown, Ingram, Keller, Knox City,	)	
Lakeway, Lago Vista, Llano, McQueeney,	)	
Nolanville, San Antonia, Seymour, Waco and	)	
Wellington, Texas, and Ardmore, Durant,	)	
Elk City, Healdton, Lawton and Purcell,	)	
Oklahoma.)	)	

TO: John A. Karousos, Chief
Allocations Branch, Policy and Rules Division
Mass Media Bureau

COMMENTS
ON "RESPONSE TO REQUEST FOR SUPPLEMENTAL INFORMATION"

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May 14, 2002

Summary

Given the opportunity to demonstrate that a crucial aspect of their Counterproposal is as they have represented it to be, the Joint Parties have declined to do so. Instead, the Joint Parties have refused to submit the agreement between themselves and the licensee of Station KICM(FM), Krum, Texas, pursuant to which the Krum station would be down-graded in order to accommodate the Joint Parties' other various proposals.

The Joint Parties' refusal to comply with the Commission's specific request for a copy of that Agreement is reason enough to dismiss the Joint Parties' Counterproposal for failure to prosecute. But the arguments advanced by the Joint Parties in support of their refusal provide even further reason for the Commission to reject the Joint Parties' various submissions *in toto*. The Joint Parties' Response to the Commission's request for the Agreement is based on factual inaccuracies, gross misstatements of Commission precedent, and other information which, in light of other information ascertainable from the Commission's records, raises questions concerning the Joint Parties' candor here.

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1. Elgin FM Limited Partnership and Charles Crawford ("Elgin FM/Crawford") hereby submit their Comments with respect to the "Response to Request for Supplemental Information" ("Response") filed by First Broadcasting Company, L.P., Rawhide Radio, LLC, Next Media Licensing, Inc., Capstar TX Limited Partnership and Clear Channel Broadcast Licensees, Inc. (the "Joint Parties") on April 26, 2002 in the above-captioned proceeding. As discussed in detail below, the Response fails to provide the Commission with precisely the information which the Commission had requested the Joint Parties to file. Instead, the Response provides various inaccurate claims in an attempt to justify the Joint Parties' refusal to provide the requested information. Since the Joint Parties have voluntarily elected to refuse to respond to a legitimate Commission request for information, and particularly since Elgin FM/Crawford have determined that the representations advanced by the Joint Parties are of questionable accuracy, Elgin FM/Crawford submit that the Joint Parties' Counterproposal can and should be summarily dismissed for failure to prosecute.

Background

2. The short background here is simple: the Joint Parties' Counterproposal is contingent, in part, on the willingness of AM & PM Broadcasters, LLC ("AM & PM"), licensee of Station KICM(FM), Krum, Texas, to downgrade that station from Class C1 to Class C2. In January, 2002, the Commission requested that the Joint Parties submit a copy of their agreement with AM & PM within 30 days. After dilly-dallying around for three months, the Joint Parties finally filed their Response in which they declined to file the agreement. The Joint Parties did, however, assure the Commission that, in the Joint Parties' view, the limitations of Section 1.420(j) do not apply to the agreement. That, presumably, was supposed to be enough to satisfy the Commission.

3. The full background to this is considerably more complicated and requires a fuller factual recitation than the Joint Parties have chosen to provide.

4. The story starts in 1998, when AM & PM acquired Station KICM(FM), then allotted to Healdton, Oklahoma, and Station KGOK(FM), then allotted to Pauls Valley, Oklahoma. The KICM(FM) transaction was proposed in an application (File No. BALH-19971125GE) filed in November, 1997; it was consummated on April 20, 1998. The Pauls Valley deal was proposed in an application (File No. BALH-19980205GH) filed in February, 1998; it was consummated on June 2, 1998.

5. In apparent anticipation of these separate acquisitions, on February 20, 1998 -- *i.e.*, after the assignment applications for the stations had been filed, but before either assignment had been consummated -- AM & PM filed (or, presumably, caused to be filed) proposals to reallot the Healdton and Pauls Valley channels to different communities: the Healdton channel used by KICM(FM), *i.e.*, Channel 229C2, would be moved to Krum, Texas and downgraded to Class C3, while the Pauls Valley channel used by KGOK(FM), Channel 249C3, would be moved to Healdton. Those changes were approved by the Commission in a Report and Order ("the *Healdton/Pauls Valley/Krum R&O*") released March 12, 1999 in MM Docket No. 98-50, 14 FCC Rcd 3932 (Allocations Branch 1999).

6. So as of December, 1998, AM & PM was the licensee of both KICM(FM) and KGOK(FM), and it had pending rule making proposals to modify the channels and/or communities of license of those stations. On December 28, 1998, AM & PM entered into an agreement with the Joint Parties pursuant to which AM & PM agreed to relocate KGOK(FM) from its then-still-proposed-but-not-yet-adopted community of Healdton to Purcell,

Oklahoma, relocate that station's transmitter site, and downgrade the station's channel to Class A. In return, the Joint Parties agreed to pay AM & PM $1.1 million (One million one hundred thousand dollars), and possibly an additional "build out fee" of $100,000. The transactions were contingent on final approval of the Joint Parties' Counterproposal in the Quanah, Texas proceeding, MM Docket No. 00-148, even though neither that counterproposal nor even the initial Quanah petition for rule making had been filed at that point. *See* Attachment A hereto (Schedule 3 of Attachment 4 from File No. BALH-20020329ADG). [1/]

7. The *Healdton/Pauls Valley/Krum R&O*, released in March, 1999, required AM & PM to file, *inter alia*, a Form 301 application proposing the modification of the facilities of Station KICM(FM) consistent with the changes effectuated in the order. AM & PM filed such an application on June 24, 1999 (File No. BPH-19990624IG), which was granted on July 24, 2000.

8. On July 17, 2000 the Quanah proceeding was initiated with the filing of a Petition for Rule Making.

9. On July 25, 2000 -- the very next day after the grant of the KICM(FM)

[1/] As far as Elgin FM/Crawford have been able to determine, the existence of the agreement between AM & PM and the Joint Parties relative to the Pauls Valley/Healdton/Purcell situation was not disclosed to the Commission in the context of the Healdton/Pauls Valley/Krum proceeding (which was still pending when the agreement was entered into), and the general outline of the terms of that agreement had not been disclosed to the Commission until March, 2002, more than two years later, when AM & PM referred to them in an application (File No. BALH-20020329ADG) for consent to the assignment of KGOK(FM), the call sign of which has since been changed to KNOR(FM). It is not clear why the parties did not disclose the agreement prior to the conclusion of the Healdton/Pauls Valley/Krum proceeding.

relocation/downgrade application filed pursuant to the *Healdton/Pauls Valley/Krum R&O*, and eight days ***after*** the filing of the Quanah Petition for Rule Making -- AM & PM filed an application (File No. BMPH-20000725AAZ) ("the KICM Modification Application") proposing to upgrade the KICM(FM) channel in Krum to Class C1 status.

10. Three months later, on October 10, 2000, the Joint Parties filed their Counterproposal to the initial Quanah proposal. In their Counterproposal the Joint Parties addressed both the KICM Modification Application and the KGOK(FM)/Healdton allotment because both were inconsistent with the proposals being advanced by the Joint Parties.

11. With respect to Channel 249C3, assigned in the *Healdton/Pauls Valley/Krum R&O* to KGOK(FM) for use in Healdton, the Joint Parties proposed to address the inconsistency by downgrading that channel to Class A and changing its community of license from Healdton to Purcell. *See* Joint Parties Counterproposal at 16-18. According to the Counterproposal,

> FBC [one of the Joint Parties] has entered into a reimbursement agreement with AM & PM for the expenses incurred in relocating Station KGOK. FBC hereby states that it will reimburse AM & PM for its reasonable expenses.

Joint Parties Counterproposal at 17. The Joint Parties did not advise the Commission that the term "reasonable expenses" had already been quantified by the parties at $1.1 million, nor did they offer any indication of what particular expenses were included in those "reasonable expenses".

12. With respect to Channel 229C1, which was proposed in the KICM Modification Application for use by KICM(FM) in Krum, the Joint Parties simply stated that they "expect[ed] that the Class C1 application will be dismissed shortly", ostensibly because

the Joint Parties believed that that application was defective. Joint Parties Counterproposal at 13, n. 5. The Joint Parties' claims concerning supposed deficiencies in the KICM(FM) modification application echoed claims advanced in an Informal Objection to that application. The Informal Objection had been filed on August 31, 2000 by one of the counsel who represents the Joint Parties.

13. In May and June, 2001, it was reported to the Commission by the Joint Parties that "certain of the Joint Parties" were in the process of negotiating an agreement with AM & PM "to settle certain matters related to" the KICM Modification Application. Consent Request for Extension of Time to Comment, filed May 25, 2001 by the Joint Parties in connection with File No. BMPH-20000725AAZ, at 1; Consent Request for Extension of Time to Comment, filed June 1, 2001, at 1.

14. The Joint Parties' Counterproposal was placed on public notice on August 3, 2001, with a comment deadline of August 20, 2001. On August 20, 2001, the Joint Parties submitted Reply Comments in which they stated, *inter alia*,

> Recently, after extensive negotiations, an agreement has been reached with AM & PM to compensate it for the downgrade of KICM from Class C1 to C2 to accommodate the Joint Parties' counterproposal, if its Class C1 application for KICM is granted.

Joint Parties Reply Comments in MM Docket No. 00-148, filed August 20, 2001, at 1-2. The terms of the agreement were not divulged by the Joint Parties.

15. Perhaps by coincidence, the KICM Modification Application happened to be granted on August 20, 2001, the date on which the Joint Parties' Reply Comments were filed. Public notice of that action was given on August 24, 2001. *See* Broadcast Actions, Report No. 45056, released August 24, 2001.

16. On January 18, 2002, the Commission requested that the Joint Parties file a copy of their agreement with AM & PM relative to the KICM Modification Application within 30 days. After requesting two extensions of that deadline, the Joint Parties finally responded to the Commission's request on April 26, 2002. They did not submit a copy of the agreement, despite the Commission's specific direction. Instead, they provided a vague and general description of the agreement [2/] and then argued at some length that the agreement is not subject to Section 1.420(j) of the Rules.

The Joint Parties' Response

17. Section 1.420(j) is intended to prevent parties from engaging in the submission of proposals with the goal of deriving profit in return for the withdrawal of those proposals. *Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes ("Abuses of Process")*, 5 FCC Rcd 3911, 3915, ¶27 (1990), *recon. denied*, 6 FCC Rcd 3380 (1991). The rule achieves this goal by (a) expressly prohibiting payment of anything more than a party's legitimate and prudent expenses in return for the withdrawal of such proposals and (b) requiring that any agreements relating to such withdrawals be submitted to the Commission for its own independent inspection. The latter component reflects the Commission's embrace of the prudent policy of "trust but verify".

18. The Joint Parties take the initial position that Section 1.420(j) is not applicable

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[2/] According to the Joint Parties' Response, the agreement provides that "if (i) AM & PM's application for Channel 229C1 at Krum were granted, and (ii) the Joint Parties' counterproposal were granted, AM & PM would file an application to downgrade Station KICM(FM) to Class C2 in exchange for compensation."

here because the rule itself refers to the "dismissal or withdrawal of any expression of interest", Joint Parties Response at 2, and, according to the Joint Parties, the AM & PM/Joint Parties Krum agreement does not involve any such dismissal or withdrawal. [3/]

19. It appears that the Joint Parties are reading Section 1.420(j) as narrowly as possible, clinging to the most limited possible interpretation of that rule's limitations. Such a reading is plainly inappropriate, however. In amending the rule to its current form in 1991, the Commission stressed that the rule would apply broadly to "any conflicting filing with a potential functionally equivalent to that of a counterproposal". *Abuses of Process, supra*, 5 FCC Rcd at 3914, ¶27.

20. The Commission emphasized that "conflicting filings", in this context, could include upgrade applications as well as counterproposals and expressions of interest submitted in a rule making proceeding. *Id.* Applications filed by the comment date in a rule making proceeding are deemed "expressions of interest" subject to the limitations of Section 1.420(j). *See, e.g., id.; Pauls Valley, Oklahoma, et al.*, 13 FCC Rcd 13458, 13460 (Allocations Branch 1998). Even applications which are filed prior to a rule making may be deemed conflicting expressions of interest if the applicant could have been aware of the anticipated filing of the rule making proposal. *Abuses of Process, supra*; *Banks, Oregon et al.*, 13 FCC Rcd 6596, 6602-03 (Allocations Branch 1998).

21. The Krum Modification Application is thus clearly a "conflicting filing" within

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[3/] Of course, since the Joint Parties have declined to provide the agreement itself, the Commission has no way of knowing whether the Joint Parties' claim is accurate.

the meaning of Section 1.420(j). As indicated above, it was filed one week ***after*** the initiation of the Quanah proceeding and several months prior to the comment deadline in that proceeding. Moreover, since the Commission's records establish that AM & PM, the Krum licensee, had been in discussions with the Joint Parties as early as December, 1998 concerning some FM channel re-allignment proposal the Joint Parties were planning to file, and since those earlier discussions had resulted in an agreement pursuant to which AM & PM stood to gain more than $1 million to agree to move its still-not-yet-reallotted-Pauls Valley-channel from Healdton (where AM & PM was then proposing to move it) to Purcell, AM & PM clearly had reason to believe that some major rule making proposal was in the works in that neck of the woods. It is difficult to believe that the Joint Parties could claim with a straight face that this matter was not subject to Section 1.420(j).

22. The Joint Parties' next gambit is to claim that AM & PM has not really dismissed or withdrawn any expression of interest. Who are they kidding? AM & PM was, at the time the Joint Parties' counterproposal was filed, an applicant proposing to operate a Class C1 station in Krum, and under the agreement -- which was negotiated and executed while that application was still pending [4/] -- it committed to a significant downgrade from

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[4/] The precise date on which the AM & PM/Joint Parties agreement was executed is not clear -- and perhaps that's one reason the Joint Parties are reluctant to provide the Commission a copy of the agreement. But the record is clear that that agreement was in negotiation as early as May-June, 2001 -- the Joint Parties have expressly acknowledged that. *See* Consent Request for Extension of Time to Comment, filed May 25, 2001 by the Joint Parties in connection with File No. BMPH-20000725AAZ, at 1; Consent Request for Extension of Time to Comment, filed June 1, 2001, at 1.

In their Response the Joint Parties seem intent upon emphasizing that the KICM Modification Application had been granted by the time the AM & PM/Joint Parties agreement was executed. *See, e.g.*, Response at 3, n. 3 ("Indeed, at the time certain of the

(continued...)

that proposal. In other words, AM & PM bound itself to abandon the facilities it was then requesting (much as it had, in 1998, bound itself to abandon Healdton as the community of license of Station KGOK even before the Commission had reallotted that station's channel from Pauls Valley). Whether AM & PM chose to advise the Commission of the full details of that commitment then or later, the fact is that the commitment was made and relied upon by the Joint Parties in advocating their counterproposal. It is at best disingenuous to suggest that AM & PM has not agreed in effect to withdraw its Class C1 proposal in return for compensation.

23. The Joint Parties next claim that the Commission has "routinely permitted agreements between rule making proponents and applicants in similar circumstances". Joint Parties Response at 4. In support it cites portions of two decisions, *Pauls Valley, Oklahoma,*

[4/](...continued)
Joint Parties entered into the agreement with AM & PM they were aware that the [KICM Modification Application] was granted"). But since the Joint Parties advised the Commission on August 20, 2001 that an agreement had theretofore been reached, *see* Joint Parties' Reply Comments in MM Docket No. 00-148, and since the KICM Modification Application was not granted until August 20, 2001 -- with public notice of the grant being issued four days later -- it would appear at least questionable, if not highly unlikely, that the Joint Parties are being completely candid on that point. The fact that the Joint Parties are adamantly withholding the agreement, *i.e.*, the document which might conclusively resolve that question, further undermines the Joint Parties' credibility here.

But even if AM & PM and the Joint Parties all happened to be sitting in the same room on August 20, 2001 and even if they all simultaneously received some communication advising them of the grant of the KICM Modification Application as of that date and even if they then all duly signed their agreement and submitted it to the Commission that same day, that would be completely immaterial. The Commission has clearly held that an application is deemed to be still "pending" and, therefore, still in conflict with a rule making, as long as the grant of that application is not final. *Pauls Valley, Oklahoma, supra*, 13 FCC Rcd at 13460. Since public notice of the grant of the KICM Modification Application was not issued until August 24, 2001, that application remained pending until October 3, 2001. *See* Sections 1.106, 1.117.

supra and *Farmersville, Texas, et al.*, 12 FCC Rcd 4099 (Allocations Branch 1996), *recon. dismissed*, 12 FCC Rcd 12056 (Policy and Rules Division 1997).

24. According to the Joint Parties, in *Pauls Valley*, a Sulphur, Oklahoma licensee

> agreed to accommodate a counterproposal by downgrading from Class C3 to A should its Class C3 application be granted, ***in exchange for compensation in excess of expenses***. The Commission held that the agreement complied with Section 1.420(j) because the applicant received no compensation in exchange for dismissing its application and forgoing [sic] to file an application for the higher class facilities. [*Pauls Valley, Oklahoma*], 13 FCC Rcd at 13460-61.

Joint Parties Response at 4 (emphasis added). That, at least, is the Joint Parties' version.

25. Rather than offer our own version of what the Commission said, we will let the Commission speak for itself. In *Pauls Valley* the Sulphur licensee had pending, at the time the rule making counterproposal was filed, an application specifying Class C3 operation. The counterproponents proposed that that licensee forego operation as a Class C3, and instead operate as a Class A. In the portion of the *Pauls Valley* decision referred to by the Joint Parties, the Commission stated as follows:

> The joint counterproposal contemplates Station KFXT [*i.e.*, the Sulphur station] foregoing operation on Channel 265C3. Since the Channel 265C3 application remained "pending", there was a "dismissal" of a pending application under Section 1.420(j) of the Rules. In order to avoid a potential abuse of the Commission's processes, Section 1.420(j) requires that the party dismissing its application certify that it has not received any consideration for the dismissal in excess of its legitimate and prudent expenses and provide a copy of any agreement regarding the dismissal of its application. In this regard, the president of the Station KFXT licensee submitted a declaration stating that no consideration is being paid or promised in exchange for the dismissal of its application or foregoing Channel 265C3 facilities. The president further stated that reimbursement is only being paid for its future costs and expenses related to the frequency change and the transmitter site relocation.

In a footnote (note 5, page 13462), the Commission further observed that the parties had

stated that the Sulphur licensee "did not receive any financial consideration for withdrawing its granted, but not yet final, construction permit."

26. Perhaps Elgin FM/Crawford are missing something here, but we see nothing in the Commission's decision which even vaguely suggests, much less expressly states, that "compensation in excess of expenses" was approved there. And on the off-chance that we might be missing something, we went back to the docket and reviewed the underlying submissions of the parties on which the Commission's decision is based. A copy of a "Joint Supplement Regarding Sulphur, Oklahoma", submitted by the counterproponents and the Sulphur licensee, is included as Attachment B hereto. That submission was filed to "clarify the agreement" between the parties. As the Commission will note, there is no reference therein to any "compensation in excess of expenses", as the Joint Parties now claim. To the contrary, the Sulphur licensee represented expressly that

> The agreement . . . is to pay [the Sulphur licensee] an amount for its costs and expenses related to the frequency change and the transmitter site relocation to a site further north than the present KFXT(FM) site.

See Attachment B hereto at 4.

27. So contrary to the Joint Parties' explicit representation, the *Pauls Valley* decision did NOT involve approval of any compensation "in excess of expenses."

28. The same is true of the *Farmersville, Texas* case cited by the Joint Parties for the same proposition. The matter of reimbursement to the affected licensee in that case was addressed in the Commission's decision on reconsideration, 12 FCC Rcd 12056, 12057-58. According to the Commission, "all parties filed affidavits stating that reimbursement is being limited to the costs necessary to effectuate operation on Channel 264A at Comanche." 12

FCC Rcd at 12057.

29. Because of certain unusual complications which arose with respect to the treatment of the affected licensee in the *Farmersville, Texas* proceeding, the Commission had requested clarification of the settlement terms. In response, the parties advised the Commission that the affected licensee would be reimbursed for the "costs related to [the station] having to change frequency and transmitter site, including engineering and legal fees, necessary equipment purchases and promotional costs." *See* Joint Supplement Regarding Comanche, Oklahoma and Harold Cochran, filed August 5, 1997 in MM Docket No. 96-10 (included as Attachment C hereto) at 2. Despite the fact that the Commission had specifically requested disclosure of the exact amount of the reimbursement and how it was to be itemized, the parties declined to provide that information. *Id.* at 3.

30. So again, unless we're missing something, the Joint Parties' claim that the *Farmersville, Texas* proceeding involved any Commission approval of "compensation in excess of expenses" is dead wrong.

31. The Joint Parties are similarly wrong when they attempt to distinguish this case from the decisions in *Detroit, Texas, et al.*, 13 FCC Rcd 15591 (Allocations Branch 1998), *recon. dismissed*, 15 FCC Rcd 19648 (Allocations Branch 2000), and *Banks, Oregon, et al.*, 13 FCC Rcd 6596 (Allocations Branch 1998), *recon. denied*, 16 FCC Rcd 2272 (Allocations Branch 2001). Both involved rejections of agreements which provided for compensation in excess of expenses. The Joint Parties claim that, here, AM & PM is not being compensated for amending or withdrawing a pending application. Joint Parties Response at 5. That may or may not be -- since the Joint Parties have chosen not to submit

their agreement, the Commission has no way of knowing for sure.

32. The Joint Parties suggest that a further distinction is the fact that, here, "AM & PM filed [the KICM Modification Application] *before* the initiation of the rule making proceeding." Joint Parties Response at 5 (emphasis in original). But the Joint Parties are wrong. As noted above, the KICM Modification Application was filed a week *after* the initial petition for rule making which initiated this proceeding. Moreover, the Joint Parties claim, AM & PM "would not have filed [the KICM Modification Application] for any abusive purpose because it did not know that a subsequent rule making proposal was to be filed." *Id.* Here, presumably, the Joint Parties are referring to their own counterproposal, which was filed after the KICM Modification Application.

33. The problem with the Joint Parties' claim, though, is that it ignores the fact that the Joint Parties and AM & PM had discussed at least some reallotment proposals as early as December, 1998, and possibly earlier. And in those discussions the Joint Parties had put $1.1 million on the table in connection with the Pauls Valley/Healdton/Purcell move. Whether or not they formally discussed any possible reallotments relative to the Krum facility, the Joint Parties' obvious (and well-funded) interest in FM allotments in that particular neck of the woods could not have escaped AM & PM's attention. That being the case, the Joint Parties' glib, back-of-the-hand assertion that AM & PM "did not know" about any subsequent proposals is less than convincing, particularly when it is not supported by any declaration based on personal knowledge and submitted under penalty of perjury.

34. The Joint Parties' final argument is that the Commission should carve out a new category of exceptions to its well-established case precedent in this area. According to

the Joint Parties, the AM & PM/Joint Parties' agreement should be deemed subject to Section 73.3517(e) -- which applies to agreements to file simultaneous contingent applications to eliminate spacing violations. Joint Parties Response at 6. There are multiple problems with that suggestion. Most obviously, the instant proceeding involves rule making proposals, not applications. Further, the Joint Parties suggest Commission precedent does not apply here because AM & PM and the Joint Parties have "entered into a binding agreement". *Id.* Perhaps so, but the Commission has not seen that "binding agreement", and the Commission does not know what its terms are -- because the Joint Parties have refused to file it. According to AM & PM, the agreement expires on June 30, 2002. *See* Statement of AM & PM Broadcasters, Inc., filed April 26, 2002. So even if the supposedly "binding" nature of the agreement were deemed, for the sake of argument, to be material here, that "binding" nature is apparently scheduled to go away in less than two months.

35. A further problem with the Joint Parties' effort to invoke Section 73.3517(e) is the fact that, even if that section were to be deemed applicable, it would ***STILL*** require the submission of the parties' agreement, since Section 73.3517(e) requires such a submission.

36. At bottom, the Joint Parties's position is simply this: trust us, really, everything is legit and on the up and up, honest.

37. Under the circumstances, trust is not warranted. Let's review the record:

-- In their Counterproposal the Joint Parties represented that AM & PM would be reimbursed for its reasonable expenses in connection with the relocation of KGOK(FM) from Healdton to Purcell. But come to find out that the payment there has already been set at $1.1 million, including a $100,000 "build-out fee". The Commission could well wonder how the relocation of a relatively small radio station could possibly cost that much, and how those costs could have been so accurately estimated more three years ago.

-- In their Response, the Joint Parties have blatantly misstated the rulings of at least two cases, Pauls Valley, Oklahoma, and Farmersville, Texas. This cannot be the result of inadvertence, since one of the Joint Parties' counsel happens to have been counsel in both of those proceedings and, thus, presumably was directly familiar with the facts of those two cases.

-- In their Response, the Joint Parties have misstated facts which they believe to be particularly material here. For example, they assert, incorrectly, that the KICM Modification Application was filed before the initiation of this proceeding, when the application was in fact filed a week after the petition for rule making herein.

-- In their Response, the Joint Parties seem to emphasize the fact that AM & PM could build its Class C1 facilities if it so chose pending the outcome of the Quanah proceeding -- the suggestion being that that fact removes this case from the reach of Section 1.420(j). But in the *Pauls Valley* proceeding, which the Commission found to be controlled by Section 1.420(j), precisely the same facts were present. According to counsel there (who included one of the Joint Parties' counsel), the affected licensee in *Pauls Valley* was "free to construct the Class C3 facility if it desire[d] to do so subject to the outcome of th[e] proceeding." *See* Attachment B hereto (Joint Supplement Regarding Sulphur, Oklahoma) at unnumbered 2, n. 1.

38. Any of these, individually, should be sufficient to give the Commission serious reservations about the Joint Parties' honesty and candor. Taken together, they unquestionably destroy any reliability to which the Joint Parties might otherwise have laid claim.

39. And finally, against this background, the Commission must ask itself: ***WHY*** are the Joint Parties so adamant about ***NOT*** submitting their agreement? If, as they claim, the Joint Parties are ***SO*** confident that their agreement complies with the Commission's rules and policies, ***WHY WON'T THEY LET THE COMMISSION JUDGE FOR ITSELF***? Just as the Great Oz urged Dorothy to ignore the man behind the curtain, so the Joint Parties urge the Commission not to bother to look at the agreement itself.

40. But the Commission's policy, as set out in its rules and as long applied in case

after case, is "trust, but verify". Here, the Joint Parties' persistent refusal to submit their agreement prevents the Commission from performing that essential verification. And any notion that the Joint Parties may be entitled to some "trust" is contradicted by their demonstrable history of misstatements and lack of candor here.

41. The Joint Parties have had more than a fair opportunity to demonstrate that their counterproposal, filed more than 18 months ago, is consistent with Commission policies. Their assiduous refusal to provide the Commission with a copy of their agreement, notwithstanding a specific request for that agreement, should not be countenanced. Rather, the Commission can and should deem the Joint Parties' refusal to be a failure to prosecute. Accordingly, the Joint Parties' counterproposal can and should be dismissed.

Respectfully submitted,

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May 14, 2002

ATTACHMENT A

Schedule 3

Assumed Contracts and Conditions Thereof

1. Buyer shall assume the Facilities Change Agreement ("FCA"), dated as of December 23, 1998, between Seller and the "Joint Parties," who have filed a Counterproposal (RM-10198) in the Quanah, TX Rulemaking Proceeding (MM Docket No. 00-148). Should the FCC grant that Counterproposal in an order that has become "final," Buyer shall be obligated, pursuant to the FCA, to (a) relocate KNOR to a new transmitter site and change its community of license to Purcell, OK, (b) downgrade that facility to a "Class A" FM station and (c) divide equally with Seller the $1.1 million dollar payment from the Joint Parties for such relocation (but Buyer would be entitled to

retain the entire $100,000 "build out fee" payment from the Joint Parties).

2. Buyer shall assume the Facility Change Agreement ("FCA"), dated as of July 28, 1999, between Seller and North Texas Radio Group, L. P. ("NTRG"). Should the FCC grant the Counterproposal filed by NTRG on December 3, 2001 in the Crowell, TX Rulemaking Proceeding (MM Docket No. 01-293) in an order that has become "final," Buyer shall be obligated, pursuant to the FCA, to (a) relocate KACO to a new transmitter site and change its community of license to Apache, OK and (b) divide equally with Seller the $500,000 payment from NTRG (but Buyer would be entitled to receive the transmitter, antenna, STL equipment, coaxial cable and transmitter building).

3. KACO Tower Lease

4. ABC Trade Contracts (2)

5. Studio Lease

6. Computer Lease

ATTACHMENT B

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BE FORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of

Amendment of Section 73.202(b)	)	
Table of Allotments	)	MM Docket No. 97-84
FM Broadcast Stations	)	RM-9021
(Pauls Valley, Oklahoma)	)	

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

JOINT SUPPLEMENT REGARDING SULPHUR, OKLAHOMA

Bowie-Nocona Broadcasting Company, Inc., Dynamic Broadcasting, Inc., and East Texas Broadcasting Company, Inc. ("Joint Petitioners") and DFWU, Inc. ("DFWU"), by their respective counsel, hereby submit this joint supplemental pleading with declarations in response to a request from the Commission staff. The Commission's staff has requested that the parties clarify the agreement reached between the parties whereby DFWU will be reimbursed for the reasonable costs related to its channel change and transmitter site relocation. On April 4, 1997, DFWU was granted an upgrade to Class C3 by a one-step application (BPH-960726IC). Previously in 1992, DFWU had obtained a Class C2 allotment through a rule making proceeding but never implemented that upgrade. In view of the fact that the joint petitioner's counterproposal was filed on April 28, 1997, prior to the date that the Class C3 grant was final, the Commission staff has asked for a clarification that the parties' agreement did not involve a payment from the joint petitioner to DFWU to withdraw the then granted but not yet final Class C3 application. In addition the joint petitioners will take this

opportunity to clarify that the agreement did not contemplate having DFWU forego from filing a Class C2 application.

On May 30, 1997 the Commission issued a Report and Order (DA-97-1093) in which it downgraded Station KFXT from Channel 265C2 to Channel 265C3. Station KFXT currently operates at 3 kW@91 meters on Channel 265A. By changing to Channel 291A at a new transmitter site, KFXT could operate its facility with 6 kW and thereby increase its coverage area and population substantially.

The counterproposal states at p. 15, "the joint petitioners hereby state that they will reimburse KFXT for the channel and site changes". The parties never discussed and certainly did not intend to have any portion of the consideration applied to DFWU's withdrawing its Class C3 application[1] or its willingness to forego filing an application for the Class C2 facility. The parties have provided declarations attesting to that fact.

Accordingly, the parties state in their declarations that the agreement reached between the parties does not contemplate any payment for having DFWU withdraw the Class C3 application nor forego the filing of an application for a Class C2 facility. Furthermore, there is no other agreement between the parties contemplating any such payment. Accordingly, the parties to this proceeding urge the Commission to issue a Public Notice accepting the April 18, 1997 counterproposal and to act expeditiously on this proposal once the record is closed.

[1] In this regard, DFWU's application for a Class C3 was granted on April 4, 1997 and remains in effect. DFWU is free to construct the Class C3 facility if it desires to do so subject to the outcome of this proceeding.

Respectfully submitted,

BOWIE-NOCONA BROADCASTING COMPANY, INC.

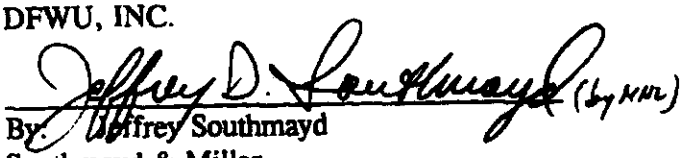
DYNAMIC BROADCASTING, INC.

EAST TEXAS BROADCASTING CO., INC.

By: Mark N. Lipp
Ginsburg, Feldman and Bress
1250 Connecticut Avenue, NW
Suite 800
Washington, DC 20036
(202) 637-9086

Their Counsel

DFWU, INC.



By: Jeffrey Southmayd
Southmayd & Miller
1220 19th Street, NW
Suite 400
Washington, DC 20036
(202) 331-4100

Its Counsel

February 23, 1998

DECLARATION

I, Sherry Austin, President of DFWU, Inc. (hereafter "DFWU"), the licensee of KFXT(FM), Sulphur, Oklahoma, hereby state that no party to the MM Docket No. 97-84 proceeding has paid, agreed to pay, or promised to pay DFWU or me in exchange for dismissing the DFWU application for a Class C3 facility at Sulphur, Oklahoma, or to forego in filing an application for Class C2 facilities for KFXT (FM). In fact, being paid consideration for either of these matters was never even discussed with me in connection with the MM Docket No. 97-84 proceeding. The agreement by DFWU and the parties to the counterproposal is to pay DFWU an amount for its costs and expenses related to the frequency change and transmitter site relocation to a site further north than the present KFXT(FM) site. There is no agreement between DFWU and anyone, including the parties to the counterproposal, whereby DFWU has agreed to be paid any consideration in return for dismissing its Class C3 up-grade application, or for DFWU' s agreement to forego the filing of a Class C2 up-grade for the station.

I hereby certify that the statement made herein are true and correct to the best of my personal knowledge and belief and are mad in good faith.

Date: February 20, 1998

Sherry Austin

Sherry Austin
President, DFWU, Inc.

DECLARATION

I, Bill Etter, President of Bowie-Nocona Broadcasting Company, Inc. ("BNBC"), hereby state the neither I nor any other principal of BNBC has paid, agreed to pay or promised to pay DFWU, Inc., licensee of Station KFXT, Sulphur, Oklahoma, in exchange for dismissing its application for a Class C3 facility at Sulphur, Oklahoma or to forego filing an application for Class C2 facilities. The agreement signed by BNBC and DFWU is to reimburse DFWU for its expenses related to the channel change and transmitter site relocation. There is no other agreement between BNBC and DFWU in which DFWU would be paid for dismissing the Class C3 application or for its willingness to forego the filing of a Class C2 application.

I hereby certify that the statements are true, complete and correct to the best of my knowledge and belief and are made in good faith.

Bill Etter
President
Bowie-Nocona Broadcasting Company, Inc.

PH012.001

#::19635611

DECLARATION

I, John Mitchell, President of East Texas Broadcasting Company, Inc. ("ETBC"), hereby state that neither I nor any other principal of ETBC has paid, agreed to pay or promised to pay DFWU, Inc., licensee of Station KFXT, Sulphur, Oklahoma, in exchange for dismissing its application for a Class C3 facility at Sulphur, Oklahoma or to forego filing an application for Class C2 facilities. The agreement signed by ETBC and DFWU is to reimburse DFWU for its expenses related to the channel change and transmitter site relocation. There is no other agreement between ETBC and DFWU whereby DFWU would be paid for dismissing the Class C3 application or for its willingness to forego the filing of a Class C2 application.

I hereby certify that the statements are true, complete and correct to the best of my knowledge and belief and are made in good faith.

John Mitchell
President
East Texas Broadcasting Company, Inc.

PH012.001

#:196819\1

DECLARATION

I, Lloyd Mynatt, President of Dynamic Broadcasting, Inc. ("DBI"), hereby state that neither I nor any other principal of DBI has paid, agreed to pay or promised to pay DFWU, Inc., licensee of Station KFXT, Sulphur, Oklahoma, in exchange for dismissing its application for a Class C3 facility at Sulphur, Oklahoma or to forego filing an application for Class C2 facilities. The agreement signed by DBI and DFWU is to reimburse DFWU for its expenses related to the channel change and transmitter site relocation. There is no other agreement between DBI and DFWU whereby DFWU would be paid for dismissing the Class C3 application or for its willingness to forego the filing of a Class C2 application.

I hereby certify that the statements are true, complete and correct to the best of my knowledge and belief and are made in good faith.

Lloyd Mynatt
President
Dynamic Broadcasting, Inc.

PH012.001

CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Ginsburg, Feldman & Bress, hereby certify that I have, this 23rd day of February, 1998, caused to be delivered by U.S. mail, postage pre-paid or by hand, as indicated, the foregoing "Joint Supplement Regarding Sulphur, Oklahoma" as follows:

* Mr. John A. Karousos
Chief, Allocations Branch
Federal Communications Commission
2000 M Street, NW
Room 554
Washington, DC 20554

* Robert Hayne, Esq.
Allocations Branch
Federal Communications Commission
2000 M Street, NW
Room 555
Washington, DC 20554

* Ms. Leslie K. Shapiro
Federal Communications Commission
2000 M Street, NW
Room 564
Washington, DC 20554

Tom Stamper
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Lawton, OK 73505

Cary Tepper, Esq.
Booth Freret Imlay & Tepper, P.C.
5101 Wisconsin Avenue, NW
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Washington, DC 20016-4120

Roy Floyd, President
Carter County Broadcasting
P.O. Box 248
Bonham, TX 75418

Lisa M. Balzer

* HAND DELIVERY

PH012.001

#::196639\1

ATTACHMENT C

DOCKET FILE COPY ORIGINAL **ORIGINAL**

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 96-10
Table of Allotments	)	RM-8738
FM Broadcast Stations	)	RM-8799
(Farmersville, Blue Ridge,	)	RM-8800
Bridgeport, Eastland,	)	RM-8801
Flower Mound, Greenville,	)	
Henderson, Jacksboro,	)	
Mineola, Mt. Enterprise,	)	
Sherman and Tatum, Texas;	)	
and Ada, Ardmore and	)	
Comanche, Oklahoma)	)	

TO: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

JOINT SUPPLEMENT REGARDING
COMANCHE, OKLAHOMA AND HAROLD COCHRAN

Hunt Broadcasting, Inc. ("Hunt") and Harold Cochran ("Cochran"), by their respective counsel, hereby submit this joint supplemental pleading with declarations in response to a request from the Commission staff. The Commission's staff has requested that the parties clarify certain provisions of the "Consent Agreement" whereby Cochran will be reimbursed for the costs of its channel change, transmitter site change and related expenses. The parties made reference to the agreement in the "Joint Counterproposal" of April 4, 1996 and filed the agreement in "Reply Comments" of April 22, 1996. Due to the fact that Cochran was granted an upgrade to Class C2 by rule making in 1989 but never implemented the upgrade, the Commission staff has asked for a clarification that the parties' agreement did not involve a payment

from Hunt to Cochran to have him forego the opportunity to file an application for the Class C2 facility. The staff also requests that the parties disclose the exact amount of reimbursement and how it is to be itemized.

As indicated in previous pleadings, although Cochran did obtain a Class C2 allotment in 1989, he did not file an application to implement the upgrade. Cochran had been operating Station KDDQ with 3kW power and had gone silent in 1995. When Hunt informed Cochran that there was an opportunity to increase to 6kW power on a new channel at a new transmitter site and that the costs for doing so would be reimbursed, Cochran readily agreed to such changes. As stated in the "Consent Agreement" (a copy is attached) "the reimbursement costs related to KDDQ having to change frequency and transmitter site, including engineering and legal fees, necessary equipment purchases and promotional costs."

The parties never discussed and certainly did not intend to have any portion of the consideration applied to Cochran's willingness to forego filing an application for the Class C2 facility. The change from one Class A to another Class A would require a site change and the reimbursement payment was intended to compensate, to a large extent, for those costs. The Consent Agreement makes no reference to any payment for not filing a Class C2 application and the parties did not intend for the reimbursement to be applied in such manner. The parties have provided declarations attesting to that fact.

Accordingly, the parties state in their declarations that the "Consent Agreement" filed with the Commission and attached hereto does not contemplate any payment for having Cochran forego the filing of an application for a Class C2 facility. Furthermore, there is no other agreement between the parties contemplating any such payment. Should the Commission staff nevertheless request that the parties disclose the exact amount of the reimbursement payment, the parties are willing to do so in camera rather than by a public filing.

Respectfully submitted,

HUNT BROADCASTING COMPANY, INC.

By: Mark N. Lipp
Ginsburg, Feldman and Bress
1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 637-9086

Its Counsel

HAROLD COCHRAN

By: Stephen C. Simpson
Law Office of Stephen C. Simpson
1090 Vermont Avenue, NW
Suite 800
Washington, D.C. 20005
(202) 408-7035

Its Counsel

August 5, 1997

DECLARATION

I, Janice Hunt, President of Hunt Broadcasting, Inc., hereby state that neither I nor any other principal of Hunt Broadcasting, Inc., has paid, agreed to pay or promised to pay Harold Cochran for his willingness to forego filing an application for a Class C2 facility at Comanche, Oklahoma. The agreement signed by Hunt Broadcasting, Inc. and Howard Cochran is to reimburse for the expenses related to the channel change and transmitter site relocation. There is no other agreement between Hunt Broadcasting, Inc. and Harold Cochran in which he would be paid for his willingness not to file a Class C2 application.

I hereby certify that the statements are true, complete and correct to the best of my knowledge and belief and are made in good faith.

Janice Hunt,
President
Hunt Broadcasting, Inc.

July 30, 1997

DECLARATION

I, Harold Cochran, licensee of Station KDDQ(FM), Comanche, Oklahoma, hereby state that neither Hunt Broadcasting, Inc. nor any other party has paid, agreed to pay or promised to pay any consideration for my willingness to forego the filing of an application for a Class C2 facility for Station KDDQ, Comanche, Oklahoma. My decision not to file for the Class C2 channel was made years ago prior to any discussions with Hunt. The matter of filing a Class C2 upgrade application was never discussed as part of the agreement for reimbursement. The reimbursement amount is intended to pay for the frequency change, transmitter site relocation and related expenses.

I hereby state that the above statements are true, complete and correct to the best of my knowledge and belief and are made in good faith.

Harold Cochran

July 30, 1997

G:\PM\002\001\Declar2

CONSENT AGREEMENT

This Agreement is made and entered into this 4th day of April, 1996, by and between Hunt Broadcasting, Inc., licensee of Station KIKM(FM), Sherman, Texas ("KIKM"),and Harold Cochran, licensee of Station KDDQ(FM), Comanche, Oklahoma ("KDDQ").

WHEREAS, KIKM and KDDQ intend to file a petition for rule making with the Federal Communications Commission ("FCC") to change the channels allotted for Stations KIKM and KDDQ; and

WHEREAS, KIKM intends to upgrade its class of channel from Channel 244 to Channel 244C at a specific transmitter site and community of license; and

WHEREAS, KDDQ was previously granted an upgrade to Channel 245C2 but never implemented the power increase and is currently operating as a Class A station on Channel 244A; and

WHEREAS, KDDQ intends to downgrade its channel from Channel 245C2 to Channel 246A and relocate its transmitter site if necessary; and

WHEREAS, the parties intend to file petitions and, if approved, applications to implement the rule making order which would serve the public interest by providing a first local service and better serve the public;

NOW THEREFORE, in consideration of the mutual agreement of the parties contained herein KIKM and KADA agree as follows:

1. KIKM will prepare the rule making proposal for submission to the FCC with written consent from KDDQ proposing the above-described changes for both stations.

2. In consideration for KDDQ's agreement to the requested changes, KIKM will pay, as reimbursement, to KDDQ the sum of _____ dollars ($_____) within 30 days after a rule making order granting the request becomes final, i.e., no longer subject to administrative or judicial review under applicable law. The payment by KIKM will cover the reimbursable costs related to KDDQ having to change frequency, including engineering and legal fees, necessary equipment purchases and promotional costs.

3. Each party agrees that it will interpose no objection to the request of the other party to change channel, class and/or community of license consistent with the other party's proposal.

4. In the event that the FCC does not grant the requested changes by KIKM but does grant some lesser improvement which requires KDDQ to change channels, KIKM will have the option (a) to withdraw its rule making proposal and terminate this Agreement without liability to KDDQ or (b) to remain responsible for the

reasonable reimbursement of expenses incurred by KDDQ to implement the FCC order.

5. This Agreement is binding upon, and shall inure to the benefit of, the parties hereto and their respective successors and assigns.

6. This Agreement contains the entire agreement between the parties and may not be amended except by written amendment signed by both parties.

7. This Agreement shall be enforceable by specific performance.

8. This Agreement may be signed in counterparts.

WHEREFORE, the parties hereto have caused this Agreement to be signed and executed by their proper corporate officers.

My Commission Expires Jan. 20, 1997

(JEAN GOODWIN)

CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Ginsburg, Feldman and Bress Chartered, do hereby certify that I have this 5th day of August, 1997, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "JOINT SUPPLEMENT REGARDING COMANCHE, OKLAHOMA AND HAROLD COCHRAN" to the following:

* Mr. John A. Karousos
Chief, Allocations Branch
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 536
Washington, D.C. 20554

* Robert Hayne, Esq.
Allocations Branch
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Fletcher, Heald & Hildreth, P.L.C.
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Eleventh Floor
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(Counsel to Galen Gilbert)

Cliff Boyd
Cowboy Broadcasting, L.L.C.
1110 S. Santa Fe Trail
Duncanville, TX 75137
KVMX(FM)

Roger R. Harris
Pontotoc County Broadcasting, Inc.
1019 N. Broadway
Ada, OK 74820
KADA-FM

---

* HAND DELIVERED

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KGRI-FM

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Peter Gutmann, Esq.
Pepper & Corazzini, L.L.P.
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(Counsel to Oklahoma Sports Properties, Inc.)

Ted Haynes
dba Community Broadcasting Network
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KBOC(FM)

Bruce H. Campbell
Vice President
KRIG, Inc.
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KMOO(FM)

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Gardner Carton & Douglas
1301 K Street, NW
East Tower
Suite 900
Washington, DC 20005-3317

Lisa M. Balzer

G:\ph\002\001\Supplem3

CERTIFICATE OF SERVICE

I, Gene A. Bechtel, hereby certify that on this 14th day of May, 2002, I caused copies of the foregoing "Comments on "Response to Request for Supplemental Information" to be hand delivered (as indicated below) or placed in the U.S. Postal Service, first class postage prepaid, addressed to the following persons:

Roy J. Stewart, Chief
Office of Broadcast License Policy
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(BY HAND)

Robert Ratcliffe, Deputy Chief
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(BY HAND)

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Marie Drischel, General Partner
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Clear Channel Broadcast Licenses, Inc.

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Counsel for First Broadcasting Company,
L.P. and Rawhide Radio, L.L.C.

/s/ Gene A. Bechtel
Gene A. Bechtel